peril. Their duty as officers of the Court, and to all concerned, is not discharged merely by saying that they were instructed to do so. *Odger's* on Pleadings and Practice is perhaps the most elementary book on the subject. In the 20th Edition at page 206, he spells out Counsel's duty as follows:–

"Counsel must insist on being fully instructed before placing a plea of fraud on the record. Such a plea should never be provided on insufficient material, nor without warning to the client, if appropriate, that by adopting such an aggressive line of defence he may double or treble the amount of damages which he may ultimately have to pay."

Reference may also be made to Lord Denning's pronouncements in *Associated Leisure Limited* v. *Associated Newspapers Limited*[3] at page 456.

It is the view of this Court that it should be a salutory practice in Malaysia if hereafter solicitors who are instructed to make such charges first obtain a proof of their client's instructions in writing and get the same verified in the form of a Statutory Declaration so that they are not left high and dry when the time comes to justify their conduct in Court. In the present case no evidence whatsoever was led in support of numerous allegations contained in Dagang's Statement of Claim. But on the other side of the line Malik has not got off unscathed. His total lack of candour on the true role of Dagang in this matter and his attempts to relegate him to the status of a mendicant, has not earned Malik the approbation of this Court. He who comes to do equity, must come with clean hands.

A person who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story: see *Sarkar* on Evidence 11th Edition page 893 and the authorities there cited. Dagang has not discharged the onus upon him to show fraud and consequently his claim for damages must be dismissed. The declaration that he seeks cannot in the circumstances be made either since I have held that there are no contracts which can be enforced against Asnah and Esah. Malik's conduct however, is a material factor on the issue of costs as to which my finding is that each party should bear its own costs. Civil Suit No. 121 of 1982 is dismissed.

*Order accordingly.*

Solicitors: *Humfrey Ball & Co.; Tara Singh & Co.*

## GREAT ONE COCONUT PRODUCTS INDUSTRIES (M) SDN. BHD. v. MALAYAN BANKING BHD.

[O.C.J. (Zakaria Yatim J.) May 10, 1985]

[Kuala Lumpur – Suit No. C 557 of 1982]

*Banking – Dishonour of bank drafts – Breach of contract – Libel – Damages – Substantial damages if the plaintiff is a trader.*

*Defamation – Libel – Dishonour of bank draft – Damages.*

In this case the plaintiff had bought five bank drafts from a branch of the defendant bank. The plaintiff gave the bank draft to its clients as payment for the supply of coconuts. The bank drafts were dishonoured when presented on May 2 and 4, 1981 but were cleared on May 6, 1981. As a result the plaintiff lost its reputation and coconut suppliers wanted payment in cash in subsequent dealings. The plaintiff brought an action against the defendant for damages. Judgment was given for the plaintiff and it was ordered that damages be fixed at a subsequent hearing.

**Held**: (1) where the plaintiff is a trader he is entitled to recover substantial damages for the wrongful dishonour of his bank drafts. He need not even plead or prove actual damage;

(2) the plaintiff as a trader in this case was entitled to substantial damages for breach of contract and libel, but the damages must be reasonable;

(3) the factors to be taken into consideration are firstly the position and standing of the plaintiff as a trader; secondly the nature of the trade of the plaintiff; thirdly the conduct of the Bank in dishonouring the drafts and fourthly whether there was injury to the credit of the plaintiff as a trader;

(4) in the circumstances substantial damages in the sum of $15,000 was awarded for the wrongful dishonour of the cheques.

*Cases referred to:*

(1) *Hadley* v. *Baxendale* (1854) 23 L.J. Ex. 179; 9 Ex. 341; 156 E.R. 145.
(2) *Ng Cheng Kiat* v. *Overseas Union Bank* [1984] 2 M.L.J. 140.
(3) *Gibbons* v. *Westminster Bank Ltd.* [1939] 2 K.B. 882, 888.
(4) *Bank of New South Wales* v. *Milvain* (1884) 10 Vict L.R 3, 5.
(5) *Patrick Kinlan* v. *Ulster Bank Ltd.* [1928] I.R 171, 188.
(6) *Baker* v. *Australia and New Zealand Bank* [1958] N.Z.L.R. 907.

CIVIL SUIT.

*David Alfred* for the plaintiffs.

*M. Nagarajah* for the defendant.

*Cur. Adv. Vult.*

**Zakaria Yatim J.** : On May 17, 1984, V.C. George J. entered interlocutory judgment in favour of the plaintiff and ordered a date to be fixed for assessment of damages. On May 2, 1985, counsel for both parties appeared before me for the purpose of assessment of damages.

The plaintiff is a company incorporated in Malaysia having its principal place of business at No. 589 Shop House, Taman Usaha Eshan, Kepong, Kuala Lumpur. The defendant is a company incorporated in Malaysia with the registered office at No. 92, Jalan Bandar, Kuala Lumpur and carries on the business of banking with branch offices throughout Malaysia, one of which is at Kepong, Kuala Lumpur.

Damages were suffered by the plaintiff as a result of the defendant wrongfully dishonouring the plaintiff's own bank drafts. The plaintiff, for valuable consideration, bought five bank crafts from the Kepong Branch of Malayan Banking. The plaintiff then gave the bank draft to its clients being payment for the supply of coconuts. When the bank drafts were presented by the client at the Tanjong Karang Branch of the Malayan Banking, they were dishonoured. When the drafts were first presented for payment on May 2, 1981 at the said bank, no payment was made on that date. The defendant wanted to obtain clearance from the issuing branch but was unable to do so due to telegraphic breakdown in Kepong. The bearers of the said draft were asked to come again on May 4, 1981. When the drafts were presented again on May 4, they were dishonoured. All the drafts were, however, cleared on May 6, 1981. This is a clear case of a breach of contract.

The executive director of the plaintiff company, Mr. Ngan Chuan Choo, testified in court that he bought the said bank drafts to pay the clients who supplied the plaintiff with coconuts. As a result of the defendant dishonouring the bank drafts, the plaintiff company lost its reputation. Coconut suppliers wanted payment in cash in subsequent dealings. According to Mr. Ngan, his company's business dropped in the second half of 1981. During the first half of 1981, the sales were 55% of the full year's total sales. During the second half of the year, the sales were 45% of the 1981 sales. There was a drop in the second half of 1981. In 1982, the whole year's sales were lower than those in 1981. He attributed the drop in sales to the incident where the plaintiff's bank drafts were dishonoured by the defendant bank.

Another witness, Mr. Richard Ho Onn, who is a company auditor, confirmed that there was a decline in the performance of the plaintiff company. He said that the total sales during the first six months of 1981 were $1,76,104.60. The sales for the second half of 1981 were $1,061,760.40. According to him, the sales for the first six months of 1981 were 55% of the total sales and 45% of total sales for the second half of the year. In the first half of 1982 the percentage was 46% of the total sales for 1981. In the second half of that year, the percentage was 37%.

Mr. Nagarajah, counsel for the defendant cited *Hadley* v. *Baxendale*[1] and *Ng Cheng Kiat* v. *Overseas Union Bank.*[2] In the latter case, Wan Hamzah J., as he then was, awarded damages in the sum of $500.00 against the Bank for breach of contract for wrongfully refusing to honour the plaintiff's cheques; and $500.00 for libel in printing the words "account closed" on that cheque and publishing them. Relying on *Ng Cheng Kiat's* case *supra.* Mr. Nagarajah submitted that, in the present case, the plaintiff should be awarded damages in the sum of $500.00.

Counsel for the plaintiff, Mr. David Alfred, submitted that his client is a trader and therefore he is entitled as of right to substantial damages. He claimed that his client was entitled to damages in the sum of $75,000.00 for the dishonour of the said bank drafts.

I agree with Mr. Alfred that where the plaintiff is a trader he is entitled to recover substantial damages for the wrongful dishonour of his bank drafts. He need not even plead or prove actual damage. This principle is supported by the following authorities:-

In *Gibbons* v. *Westminster Bank Ltd.*[3] Lawrence J. said,

"The authorities which have been cited in argument all lay down that a trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage, but it has never been held that that exception to the general rule as to the measure of damages for breach of contract extends to any one who is not trader."

*Paget's* Law of Banking, 9th Edn. at page 240 also states:-

"Every authority from *Foley* v. *Hill* ( (1848) Z HL Cas. 28) to *Joachimson* v. *Swiss Bank Corpn* ( [1921] 3 K.B. 110, 26 Com Cas. 196) and the Bill of Exchange Act alike recognise that the Banker's primary function and duty is

to honour his customer's cheques, provided the state of the account warrants his doing so and there is no legal reason or excuse to the contrary. Apart from his contractual obligation, or as a consequence thereof, the paying banker must remember that his customer's credit is or may be seriously injured by the return of one of his cheques dishonoured, and the smaller the cheque, the greater the possible damage to credit (*Marzetti* v. *Williams* (1830) 1 B & Ad 415).

Theoretically, substantial damages may be given against the bank without proof of actual loss to the customer (*Roslin* v. *Steward* ( (1854) 14 CB 595), but a more reasonable view appears to have gained favour. It is contended that the presumption of necessary serious injury only applies where the customer is a business man and that, at least in other cases, actual damage must be pleaded and proved. As Lord Birkenhead LC said in *Wilson* v. *United Counties Bank Ltd:*

"The ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit ([1920] AC 102. 112)."

In *Ng Cheng Kiat's* case (*supra*) the learned judge, at page 140, said,

"Where a customer brings an action against his bank for wrongfully refusing to pay a cheque which he has drawn, the amount of the damages for breach of contract depends on whether or not the customer is a trader. In an action for breach of contract for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial but reasonable damages for injury to his commercial credit without the necessity of alleging and proving any actual damage . . ."

The case of *Hadley* v. *Baxendale* (*supra*) which was cited by Mr. Nagarajah has no application as it is not a case of a dishonour of bank drafts or cheques.

The question that arises now is who is a trader. In the *Bank of New South Wales* v. *Milvain,*[4] Holroyd J. said, "I think 'trader' means one whose business is to buy and sell, or to make up raw material into merchandise of which he afterwards disposes."

In the instant case, the plaintiff is a trading company. It manufactures dessicated coconuts for exports. Its factory is located at Tanjung Karang and it obtains the copra from suppliers in the Tanjong Karang area. I have no doubt that the plaintiff is a trader.

I shall now deal with the quantum of damages to be awarded to the plaintiff.

As stated earlier, Mr. Nagarajah, relying on *Ng Cheng Kiat's* case *supra.*, asked the court to award $500.00 damages to the plaintiff. In that case, the court awarded $500.00 as nominal damages and another $500.00 for libel in printing the words "account closed". A customer is in fact entitled to substantial damages for libel. Indeed the right of a trader to substantial damages for the wrongful dishonouring of his cheque is really founded upon the implication of defamation. See *Patrick Kinlan* v. *Ulster Bank Ltd.*[5]

In the *Ng Cheng Kiat's* case, the learned judge awarded $500.00 damages for libel after applying the rule for assessment of damages for libel in *Baker* v. *Australia and New Zealand Bank.*[6] The learned judge must have taken into account the following factors:- First, the plaintiff's account was closed by the bank on November 29, 1978, as the account was in debit. Secondly, the plaintiff had operated his account in "an unproper and unsatisfactory manner." On four occasions the plaintiff issued cheques for amounts far in excess of the credit balance. Many cheques drawn by the plaintiff were dishonoured. Thirdly, the bank manager apologised to the plaintiff after the cheque had been dishonoured. Taking into consideration these factors, I agree with Wan Hamzah J. when he awarded $500.00 damages for the libel.

In the *Baker's* case (*supra*) which was decided in 1958, the plaintiff was not a trader and the Court awarded her nominal damages in the sum of £6. The Court, however awarded the plaintiff £100 damages for libel. In that case, the plaintiff had sufficient amount of money in the bank to entitle her to draw the cheques. When the dishonour was discovered, there was no retraction by or an apology from the bank.

In the present case, Mr. Alfred asked the court to award damages in the sum of $75,000.00. His claim for this amount was based on the drop in sales after the bank drafts were dishonoured. According to him, the sum of $75,000.00 represents the losses suffered by the plaintiff as a result of the dishonour. I am unable to accept this argument as there is no evidence to show that the drop in sales or the losses suffered by the plaintiff was the result of the dishonour.

The plaintiff, however, is still entitled to claim substantial damages, but the damages must be reasonable. See *J.M. Holden*, The Law and Practice of Banking, 2nd. Edn. Vol. 1 p. 84. The amount asked for by the plaintiff is far too exorbitant. The

question is what are the factors to be taken into consideration in order to award substantial but reasonable damages in favour of the plaintiff in the present case. In my opinion, the factors to be taken into consideration are as follows:- First, the position and standing of the plaintiff as a trader; secondly, the nature of the trade of the plaintiff; thirdly, the conduct of the bank in dishonouring the five bank drafts; and fourthly, whether there was an injury to the credit of the plaintiff as a trader.

In the instant case, the plaintiff is a company incorporated in Malaysia having its principal place of business at Kepong, Kuala Lumpur. The plaintiff deals with the export of dessicated coconuts. It has its own factory at Tanjong Karang and it obtains copra from suppliers in Tajong Karang area. The plaintiff company has been in existence since its incorporation on October 5, 1979. Previous to the incident, *i.e.*, when the bank drafts were dishonoured, the plaintiff company had been paying its suppliers with bank drafts. On May 2, 1981, the bank drafts in question were presented for payment. The defendant attempted to obtain clearance from the issuing branch but was unable to do so due to telegraphic breakdown in Kepong. The bearers were asked to come again on May 4, 1981. On that date the drafts were presented again for payment but instead they were returned to bearer. The drafts were stamped by the bank official with the words "Cheque returned" and "... unable to contact Kepong Branch due to phone lines out of order." Just because the bank could not get clearance from the issuing branch for three days, it decided to dishonour the bank drafts through no fault of the plaintiff at all. In my opinion, the defendant has treated its client in a most shabby manner. The conduct of the bank was most irresponsible and utterly preposterous. As a result of the dishonour of the five bank drafts, the credit of the plaintiff as a trade was seriously injured. Suppliers refused to accept bank drafts, but instead they demanded cash payments from the plaintiff. In his evidence in court, the Executive Director of the plaintiff company said,

> "As a result of the Bank dishonouring the bank drafts our Company lost its reputation. Suppliers asked for cash in future dealing."

In the circumstances, I award substantial damages in favour of the plaintiff in the sum of $15,000.00 for the wrongful dishonour of the five bank drafts. In my opinion, this is a reasonable figure bearing in mind all the factors mentioned above. Costs and interest to the plaintiff.

*Order accordingly.*

Solicitors: *Sanggara & Co.; Shook Lin & Bok.*